

DRAFT BOARD ORDER



STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION
17 STATE HOUSE STATION
AUGUSTA, ME 04333

BOARD ORDER

IN THE MATTER OF

MICHAEL E. TRAPHAGEN AND DIANNE W. TRAPHAGEN) NATURAL RESOURCES PROTECTION ACT
Southport, Lincoln County) COASTAL WETLAND ALTERATION
PIER, RAMP, & FLOAT)
L-24420-4P-A-Z (denial)) APPEAL
) FINDINGS OF FACT AND ORDER

Pursuant to the provisions of 38 M.R.S. Sections 344 and 341-D (4) and Chapter 2, Section 24 (B) of the Department of Environmental Protection's regulations, the Board of Environmental Protection has considered the appeals of CHRISTOPHER O. BURSAW and TODD PARK MEROLLA, its supportive data, the response of the applicant, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. PROCEDURAL HISTORY:

On November 14, 2008, MICHAEL E. TRAPHAGEN and DIANNE W. TRAPHAGEN (applicants) filed a Natural Resources Protection Act (NRPA) application for a permit to construct a pile-supported residential pier, which would include a seasonal ramp and seasonal float. During the Department's review of the application, several letters from interested abutting property owners were received that described specific concerns associated with the proposed project.

Department Order #L-24420-4P-A-N, dated August 27, 2009, approved the construction of a permanent, pile-supported pier measuring 6 feet wide by 20 feet long, a 3-foot wide by 40-foot long seasonal ramp, and a 10-foot wide by 20-foot long seasonal float. The applicants' property is located on the east side of Cameron Point Lane in the Town of Southport.

TODD PARK MEROLLA and CHRISTOPHER O. BURSAW (appellants) filed appeals of the Department's decision to the Board on August 31, 2009 and September 5, 2009, respectively.

2. STANDING:

The appellants are abutters to the project site and nearby residents; therefore, the Board finds that the appellants are aggrieved and may bring this appeal before the Board.

3. FINDINGS & CONCLUSIONS OBJECTED TO:

The appellants object to the Department findings and conclusions relating to the following:

- A. Coastal Wetland Considerations;
- B. Existing Scenic, Aesthetic, Recreational, and Navigational Uses, including historic resources; and
- C. Habitat Considerations.

4. BASIS FOR APPEAL:

The appellants assert that the Department erred in its findings that:

- A. The applicants have avoided and minimized wetland impacts to the greatest extent practicable, and that in light of the alternatives available and the overall purpose of the project, the proposed project will not result in unreasonable impacts to the protected natural resource.
- B. The proposed project will not unreasonably interfere with existing scenic, aesthetic, recreational, or navigational uses of the protected natural resource.

5. REMEDY REQUESTED:

The appellants request that the Board reverse the August 27, 2009 Department decision approving a permit for the construction of a residential pier and its associated structures on Townsend Gut in the Town of Southport.

6. RESPONSE TO APPEAL:

A. COASTAL WETLAND CONSIDERATIONS:

The applicants proposed to directly alter four square feet of intertidal area during the construction of the proposed pier and associated structures. In addition, the construction of the proposed pier will indirectly alter 84 square feet of intertidal area and the proposed ramp and float will indirectly alter 320 square feet of subtidal area through shading effects. The coastal wetland in the location of the proposed project is geologically characterized as being primarily ledge with a moderate cover of rockweed. The applicants own two boats, one that is 22 feet long and one that is 39 feet long, both of which require a draft of 4 feet. The applicants stated that nearby public and private boat

launch facilities are inconveniently located or have long waiting lists for moorings or slips. The applicants stated that they currently use a mooring off site but wish to have water access from the project site.

In accordance with the Department's "Wetlands and Waterbodies Rules," Chapter 310, in the determination of whether the impacts of a project are unreasonable, the Board considers whether there are practicable alternatives to the project that would be less damaging to the environment. In coastal wetlands, which are wetlands of special significance, projects for which no practicable alternative may exist include, but are not limited to, those necessary for water dependent uses, walkways, crossings by road, rail or utility lines, and others. Moreover, the rules require that qualifying projects demonstrate that the amount of wetland to be altered has been minimized to the greatest practicable extent while meeting the overall purpose of the proposed project.

The appellants assert that the Department failed to adequately apply Chapter 310 standards. The appellants argue that the Department did not consider an existing alternative to the proposed project. The appellants assert that there is a nearby public boat launching facility on the Townsend Gut, next to the Southport Bridge, which is an alternative to the project that is reasonable, practicable, and less damaging to the wetland.

With their NRPA application, the applicants submitted an alternatives analysis which considered several alternative options to the proposed project. The applicants did not originally include information regarding the public boat launching facility in the application but acknowledged its existence in correspondence from the applicants' environmental consultant to Department staff dated February 4, 2009. Although the Department did not consider the existing boat launching facility during its review of the application, in response to this issue raised on appeal, Department staff visited the site of the public launching facility on October 26, 2009 and noted that the launch area is relatively small, approximately 10 feet in width, and the parking area is limited to one hour. The site contains no public docking facility or moorings. Information related to the Department's site visit was submitted to the Board and included a number of photographs.

Based on information provided by the applicants and the appellants, and the site visit, Department staff concluded that the public boat launching facility next to the Southport Bridge would not have been considered a viable alternative and would not have altered the Department's finding related to the standard of avoidance pursuant to the Chapter 310 Rules.

The Board has considered the information submitted by the appellants, the applicant, and the Department, and finds that, because of its limited size, the nature of existing parking facilities, and lack of moorings or other docking facilities, the existing public boat launching facility located near the project site does not constitute a practicable alternative such that the proposed project would result in an unreasonable impact to the coastal wetland.

B. EXISTING SCENIC, AESTHETIC, RECREATIONAL AND NAVIGATIONAL USES:

The appellants assert that information related to an existing pre-historic site was not sufficiently considered by the Department during its review of the application. The appellants state that a report entitled "The Cameron Point Excavation at Southport Island, Maine" should have been considered by the Department and by the Passamaquoddy Tribe and the Penobscot Indian Nation. This report contains details of a shell midden that was excavated on or near the project site.

The Department's finding that the proposed project would not have an adverse effect on an existing archaeological site was based on information submitted by the applicant, a site visit, and comments from the Maine Historic Preservation Commission (MHPC), the Tribal Historic Preservation Office of the Passamaquoddy Tribe, and the Penobscot Indian Nation. In its comments, MHPC concluded that the proposed project would not have an affect on any historic property. Moreover, in a letter to one of the appellants, dated December 10, 2008, MHPC stated that the existing archaeological site was examined by a University of Maine archaeology field crew in 1979 and was determined to be heavily disturbed. The site is listed in MHPC records as "not significant." Both the Passamaquoddy Tribe and the Penobscot Indian Nation commented that the project would not have an impact on any historic or archaeological site.

Based on the information contained in the application, information submitted by the appellants, and comments from MHPC, the Passamaquoddy Tribe, and the Penobscot Indian Nation, the Board finds that the proposed project will not unreasonably interfere with the existing historic shell midden site.

One of the appellants, Christopher Bursaw, contends that the proposed project will interfere with his use of his existing dock, which is located nearby. He states that the proposed dock will result in greater boat traffic in his swimming area, which could have safety implications for swimmers. Additionally, he states that the use of his existing mooring could be compromised by the use of the proposed dock and further by the potential of an additional mooring the applicant may elect to utilize. Because of the proposed project, Mr. Bursaw states that his use of the waterfront and his property value will be negatively affected.

The proposed dock will be located in the northeast corner of the Traphagen parcel, as far away from Mr. Bursaw's property as possible. The applicant responded that the Bursaw pier is more than 300 feet to the south of the proposed dock. Based on site plan contained in the record, this appears to be true, given that there is at least 300 feet of shoreline between the proposed dock site and the property line between the project site and the Bursaw property. Impacts to property values are not within the scope of impacts that the Board is authorized to review.

The Board has considered the information in the record, including evidence provided by the appellants. Based upon this information and the Board's finding that the proposed project will not result in a significant disturbance of the existing shell midden, and the finding that the proposed project is unlikely to pose a significant navigational issue to the neighboring Bursaw property or significantly impact recreational uses there, the Board finds that the proposed project will not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses of the protected natural resource.

C. HABITAT CONSIDERATIONS:

One of the appellants, Todd Merolla, stated that although the Department's significant wildlife habitat maps did not identify any special habitats associated with the project site, the site contains a variety of mammals, birds, plants, and marine species. Lobstering is regularly done in the area. The appellant asserts that the Department did not adequately consider these habitats in making its finding that the project would not unreasonably affect wildlife.

During its review, the Department solicited comments from the Maine Department of Inland Fisheries and Wildlife and the Maine Department of Marine Resources. Neither agency identified any significant wildlife habitat on the site. Moreover, Department staff visited the site on March 11, 2009 and confirmed that there are no significant wildlife habitats present. Based on the agency comments, on the site visit, and on a review of the Department's Geographic Information Systems maps, the Department found that the activity would not unreasonably harm any significant wildlife habitat, threatened or endangered plant habitat, aquatic or adjacent upland habitat, travel corridor, or freshwater, estuarine or marine fisheries or other aquatic life.

The Board has considered the information in the record and finds that, while the project site may contain various species of wildlife, it does not contain a significant wildlife habitat as determined by the Department of Inland Fisheries and Wildlife and the Department of Marine Resources. Based on its location and the nature and scope of the proposed project, the Board finds it will not unreasonably harm significant wildlife habitat, fisheries, or other aquatic life.

Based on the above findings, the Board concludes that:

1. The appellants filed a timely appeal.
2. The applicants' proposal to construct a pile-supported residential pier with a seasonal ramp and float meets the criteria for a permit pursuant to the Natural Resources Protection Act for coastal wetland alteration, as set forth in 38 M.R.S. §480-A et seq.

THEREFORE, the Board AFFIRMS Department Order #L-24420-4P-A-N approving the application of MICHAEL E. TRAPHAGEN AND DIANNE W. TRAPHAGEN to construct a pile-supported residential pier with a seasonal ramp and float in the town of Southport, Maine and DENIES the appeal of TODD P. MEROLLA AND CHRISTOPHER O. BURSAW.

DONE AND DATED AT AUGUSTA, MAINE, THIS _____ DAY OF _____, 2010.

BOARD OF ENVIRONMENTAL PROTECTION

By: _____
Susan M. Lessard, Chair